

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Transportation

BILL: CS/SB 960

INTRODUCER: Transportation Committee and Senator Bradley

SUBJECT: Protection of Motor Vehicle Dealers' Consumer Data

DATE: January 21, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Jones	Eichin	TR	Fav/CS
2.			CM	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 960 requires a licensee or third party acting on behalf of a licensee to comply with certain restrictions on sharing or reusing consumer data provided by motor vehicle dealers. Specifically, the bill requires a licensee:

- Comply with all laws on the reuse or disclosure of data, not knowingly cause a dealer to violate any applicable restrictions on the reuse or disclosure of consumer data, and, if requested by the dealer, provide a written statement specifying established procedures to safeguard consumer data;
- Provide a written list of consumer data obtained by a dealer and all persons who the data has been provided to during the previous six months, if requested by the dealer, exempting certain individuals who need not be included in the list;
- May not require a dealer grant the licensee or third party acting on behalf of the licensee direct access to the dealer's data management system to collect consumer data;
- Must allow a dealer to furnish consumer data in a widely accepted file format and through a third-party dealer selected by the dealer;
- Must compensate the dealer for any third-party claims asserted against or damages incurred by the dealer from the licensee's or third party's access, use, or disclosure of the consumer data.

The bill also provides that any cause of action against a licensee for a violation of the prohibitions or requirements established in the bill, the person bringing the action has the burden

of proving that the violation was willful or with sufficient frequency to establish a pattern of wrongdoing.

The bill takes effect upon becoming law.

II. Present Situation:

Florida has substantially regulated the relationship between motor vehicle manufacturers and motor vehicle dealers since 1970. Manufacturers, distributors, and importers (collectively referred to as licensees) enter into contractual agreements with dealers to sell particular vehicles that the licensee manufactures, distributes, or imports. Chapter 320, F.S., provides, in part, for the regulation of the relationship between manufacturers and dealers. Existing law requires the licensing of manufacturers, and regulates numerous aspects of the contracts between manufacturers and dealers.

Florida Automobile Dealers Act

A manufacturer, factory branch, distributor, or importer must be licensed under to engage in business in this state.¹ The requirements regulating the contractual business relationship between a dealer and a manufacturer are primarily found in ss. 320.60-320.70, F.S., (the Florida Automobile Dealers Act).² These sections of law specify, in part:

- The conditions and situations under which the DHSMV may deny, suspend, or revoke a license;
- The process, timing, and notice requirements for licensees wanting to discontinue, cancel, modify, or otherwise replace a franchise agreement with a dealer, and the conditions under which the DHSMV may deny such a change;
- The procedures a licensee must follow if it wants to add a dealership in an area already served by a franchised dealer, the protest process, and the DHSMV's role in these circumstances;
- Amounts of damages that can be assessed against a licensee in violation of Florida Statutes; and
- The DHSMV's authority to adopt rules to implement these sections of law.

Applicability

Section 320.6992, F.S., provides ss. 320.60-320.70, F.S., shall apply to all presently existing or hereafter established systems of distribution of motor vehicles in this state, except to the extent that such application would impair valid contractual agreements in violation of the State Constitution or Federal Constitution. The provisions do not apply to any judicial or administrative proceeding pending as of October 1, 1988, but all agreements renewed, amended, or entered into subsequent to October 1, 1988, shall be governed by these sections, including amendments, unless specifically providing otherwise.

¹ Section 320.61(1), F.S.

²Walter E. Forehand and John W. Forehand, *Motor Vehicle Dealer and Motor Vehicle Manufacturers: Florida Reacts to Pressures in the Marketplace*, 29 Fla. St. Univ. Law Rev. 1058 (2002) (No section of the statute provides a short title; however, many courts have referred to the provisions as such.), <http://law-wss-01.law.fsu.edu/journals/lawreview/downloads/293/Forehand.pdf> (last visited Jan. 15, 2016).

In 2009, the DHSMV held, in an administrative proceeding, amendments to the Florida Automobile Dealers Act do not apply to dealers having franchise agreements which were signed prior to the effective date of various amendments to that Act.³ The DHSMV has indicated it will be applying this holding to every amendment to the Florida Automobile Dealers Act, meaning dealers may have different protections under the law depending on when they signed their franchise agreement.

Civil Damages

Section 320.697, F.S., provides that any person who has suffered pecuniary loss or who has been otherwise affected because of a violation by a licensee, notwithstanding any other remedies under the Florida Automobile Dealers Act, has a cause of action against the licensee for damages and may recover damages in the amount of three times the loss, with costs and a reasonable attorney's fee to be assessed by the court. The licensee has the burden of proving that such violation did not occur upon a prima facie showing by the person bringing the action.

Consumer Data Protection

Consumer data can refer to a variety of information, including, but not limited to data such as one's:

- Personal-identifying data: name, address, telephone number, or email address;
- Demographic data: age, race, occupation, income, or education;
- Retail data: purchase history, credit card numbers, or bank account information; and
- Government data: social security or driver license numbers.

In the United States there is no all-encompassing law regulating the acquisition, storage, or use of consumer data in general terms. However, partial regulations do exist in state and federal law, including in the Federal Trade Commission (FTC) Privacy and Safeguards Rule, the Gramm-Leach-Bliley Act, and state law.

Gramm-Leach Bliley Act (GLBA)⁴

The GLBA, also known as the Financial Services Modernization Act of 1999, implemented law regarding the protection and disclosure of nonpublic personal information obtained by financial institutions, limits on reuse of information, and privacy notice requirements. The GLBA gave the Federal Trade Commission (FTC) authority to prescribe rules necessary to carry out certain purposes of the Act.

The FTC is the chief federal agency on privacy policy and enforcement. The FTC's Privacy Rule (*The Financial Privacy Rule*) is a principle part of the GLBA, and applies to vehicle dealers who extend credit to someone, arrange for someone to finance or lease a car, or provide financial

³ See *Motorsports of Delray, LLC v. Yamaha Motor Corp., U.S.A.*, Case No. 09-0935 (Fla. DOAH Dec. 9, 2009). The DHSMV ruled that a 2006 amendment to the Florida Automobile Dealers Act does not apply to a dealer terminated in 2008 because the dealer's franchise agreement was entered into prior to the effective date of the amendment. This Final Order was initially appealed but was later voluntarily dismissed. See also, *In re Am. Suzuki Motor Corp.*, 494 B.R. 466, 480 (Bankr. C.D. Cal. 2013).

⁴ 15 U.S.C. ss. 6801 *et. seq.*

advice or counseling to individuals.⁵ Personal information collected by a dealer to provide these services is covered under the Privacy Rule, which outlines when privacy notices are required to be given to consumers, information to be included in the privacy notices, limits on the disclosure and reuse of non-public personal information, and opt out requirements.⁶

The FTC's Safeguards Rule, also part of the GLBA, outlines standards for safeguarding customer information.⁷ The rule requires service providers who handle or are permitted access to customer information through its services directly to a financial institution must have a written security plan to protect the confidentiality and integrity of customer data.⁸

Florida Information Protection Act of 2014⁹

The Florida Information Protection Act of 2014 provides the procedure for protection and security of confidential personal information¹⁰ in the possession of covered entities.¹¹ Covered entities, governmental entities, and third-party agents are required to take reasonable measures to protect and secure electronic data containing personal information. When the security of a data system is breached, a covered entity must provide notice to the Department of Legal Affairs and affected individuals unless an investigation and consultation with relevant law enforcement agencies determines the breach has not and will not likely result in identity theft or financial harm to the individuals whose personal information has been accessed.¹² If a covered entity fails to provide the required notices, it may face civil penalties.

III. Effect of Proposed Changes:

The bill creates a new section of Florida Statutes, s. 320.646, within the "Florida Automobile Dealers Act" that addresses consumer data protection.

The bill defines the terms "consumer data" and "data management system" for the purposes of the created section. The term "consumer data" means "nonpublic personal information" as defined in 15 U.S.C. s. 6809(4), which means personally identifiable financial information provided by a consumer to a financial institution that results from any transaction with the

⁵ Federal Trade Commission, *FTC's Privacy Rule and Auto Dealers: FAQ*, (January 2005), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-privacy-rule-auto-dealers-faq> (last visited Jan. 17, 2016).

⁶ See 16 C.F.R. part 313.

⁷ See 16 C.F.R. part 314

⁸ *Id.*

⁹ Section 501.171, F.S.

¹⁰ "Personal information" includes an individual's first name or first initial and last name in combination with one of the following: a social security number; driver license or identification card number, passport number, military identification number, or other number issued by a governmental entity used to verify identity; a financial account number or credit or debit card number, in combination with any required security code, access code, or password needed to permit access to the financial account; an individual's medical history, mental or physical condition, or medical treatment or diagnosis; or an individual's health insurance policy number or subscriber identification number and any unique identifier used by a health insurer. A user name or e-mail address, in combination with a password or security question and answer is also considered "personal information." Information that is publicly available from a federal, state, or local governmental entity or information that is encrypted, secured, or modified by a method or technology that removes personally identifiable information is not considered "personal information."

¹¹ A "covered entity" is a sole proprietorship, partnership, corporation, trust, estate, cooperative, association, or other commercial entity that acquires, maintains, stores, or uses personal information.

¹² Section 501.171(4), F.S.

consumer or service performed for the consumer, or otherwise obtained by the financial institution. The term means consumer data collected by a motor vehicle dealer, provided by a dealer directly to a licensee or third party acting on behalf of the licensee, and does not include publicly available information or data obtained by a licensee from another source. The “data management system” refers to a computer system and web-based applications owned, leased, or licensed by a dealer. The data management system stores and provides access to consumer data collected or stored by the dealer.

The bill requires, notwithstanding a franchise agreement, that a licensee or a third party acting on behalf of the licensee that receives consumer data from a motor vehicle dealer:

- Comply with all restrictions on the reuse or disclosure of data established by state and federal law, and may not knowingly cause a dealer to violate any applicable restrictions;
- Provide a written statement to the dealer describing the established procedures adopted by the licensee or third party acting on behalf of the licensee to safeguard consumer data, if requested by the dealer;
- Provide a written list of the consumer data obtained from the dealer and list all persons who the data has been provided to by the licensee or third party acting on behalf of the licensee during the preceding six months, if requested by the dealer in writing. The dealer can make this request no more than once every six months, and the list must indicate the specific fields of data that were provided to each person. The list need not include a licensee’s service providers, subcontractors or consultants acting in the course of his or her performance of services on behalf of or for the benefit of the licensee or dealer, or the data provided, if the person also has agreed to comply with applicable consumer data laws. The list also need not include persons or the data provided to a person if the dealer has consented in writing that such person may receive consumer data.;
- May not require that a dealer grant the licensee or a third party access to the dealer’s data management system to collect consumer data;
- Must allow a dealer to furnish consumer data in a widely accepted file format and through a third-party dealer selected by the dealer;
- May access or obtain consumer data directly from a dealer’s data management system if given express consent from the dealer, in writing, that is separate from the franchise agreement and may be withdrawn upon 30 days’ written notice to the licensee; and
- Must compensate the dealer for any third-party claims asserted against or damages incurred by the dealer caused by the licensee’s or third party’s access, use, or disclosure of the consumer data.

The bill provides that in any cause of action against a licensee for prohibitions or requirements within the bill, the person bringing the action has the burden of proving that the violation was willful or with sufficient frequency to establish a pattern of wrongdoing with respect to such person’s consumer data.

The bill also reenacts s. 320.6992, F.S., to incorporate the newly created section.

The bill takes effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill could positively impact motor vehicle dealers who will be compensated by a licensee for any damages incurred as a result of the licensee's or a third party's access, use, or disclosure of consumer data. For that reason, as well as the additional restrictions placed upon licensees in obtaining consumer data from a dealer, the bill could have a negative impact to the licensees.

C. Government Sector Impact:

The bill does not appear to have an impact on state or local government.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 320.646 of the Florida Statutes.

This bill reenacts section 320.6992 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Transportation on January 20, 2016:

The CS:

- Changes the definition of “consumer data” from information collected or record created by a motor vehicle dealer which contains personal information from which the consumer’s identity could be derived, to the definition of “nonpublic personal information” as defined in 15 U.S.C. s. 6809(4), collected by the dealer and provided to the licensee or third party acting on behalf of the licensee.
- Adds that the definition of “consumer data” does not include the same or similar data obtained by a licensee from any source other than the dealer.
- Clarifies in the bill that the consumer data restrictions apply to a third party *acting on behalf of the licensee*.
- Adds that a licensee may not *knowingly* cause a dealer to violate any applicable restrictions on the reuse or disclosure of consumer data.
- Adds *upon request* from the dealer, the licensee or third party acting on behalf of the licensee must provide a written statement describing the established procedures to safeguard consumer data.
- Regarding the dealer requesting a list of consumer data obtained by the licensee and all persons the dealer’s consumer data has been provided to by the licensee or third party acting on behalf of the licensee, the CS lowers the preceding period of time the list must include, from 12 to 6 months.
- Adds that the list need not include a licensee’s service providers, subcontractors or consultants acting in the course of his or her performance of services on behalf of or for the benefit of the licensee or dealer, or the data provided, if the person also has agreed to comply with applicable consumer data laws. The list also need not include persons or the data provided to a person if the dealer has consented in writing that such person may receive consumer data.
- Makes a technical change regarding widely accepted file formats, from comma delineated to comma delimited.
- Concerning a dealer granting a licensee access to the dealer’s data management system to obtain consumer data, the CS adds the dealer must provide the licensee 30 days’ written notice to withdraw such consent.
- Adds a section to the bill providing in any cause of action against a licensee for prohibitions or requirements within the bill, the person bringing the action has the burden of proving that the violation was willful or with sufficient frequency to establish a pattern of wrongdoing.

- B. **Amendments:**

None.